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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 548

EUGENE SMALDONE AND CLYDE SMALDONE, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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IN THE

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OCTOBER TERM, 1954

No.

EUGENE SMALDONE AND CLYDE SMALDONE, *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

Petitioners, Eugene Smaldone and Clyde Smaldone, respectfully pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on November 2, 1954.

OPINIONS BELOW

The District Court rendered no opinion.

The opinion of the Court of Appeals for the Tenth Circuit, printed as Appendix A hereto and appearing at p. 1 of the Joint Appendix* unreported.

JURISDICTION

The judgments of the Court of Appeals for the Tenth Circuit were entered on November 2, 1954 (App. B, Joint Appendix, p. 27). Rehearing was denied on November 16, 1954 (App. C, Joint Appendix, p. 31), and Justice Clark

* All Appendices to this Petition are contained in the Joint Appendix to Petitions for Writ of Certiorari, which Joint Appendix also accompanies the Petition in No. 538, *William Calvaresi* and *Jerry Benallo, Jr.*, v. *United States*.

extended the time within which to file Petition for Writ of Certiorari to and including January 15, 1955 (App. D, Joint Appendix, p. 32). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1. The Court of Appeals upheld an indictment charging Petitioners with conspiracy to tamper with a jury only because the "gist of the offense charged is the unlawful agreement and * * * how many or which jurors were to be contacted was not part of the offense of conspiracy" (App. A, Joint Appendix, p. 8); but observed: "What individual jurors, or how many, or what friends of prospective jurors they undertook to contact would become *material* only when they went to trial for the substantive offenses". (Id. at 8-9) (emphasis added).

What the Court overlooked was the fact that Petitioners *had gone* to trial for the substantive offenses and the indictments charging the substantive offenses did not contain the names of the jurors, friends of jurors, or prospective jurors whom the Petitioners undertook to contact; that the convictions for these substantive offenses were then before the Court for review; and that the Court had in fact sustained those very indictments and the convictions based upon them.

Moreover, bills of particulars requesting the names of jurors, friends of jurors, and prospective jurors, had been denied by the trial court (R. 92, 106, 122-4), and the Court below sustained this denial (App. A, Joint Appendix, pp. 11-12).

The question thus presented is: Where a court, in sustaining a conspiracy indictment, has held that the names of the persons whom the Petitioners sought to contact are *material* to indictments charging substantive offenses, and the substantive indictments upon which Petitioners were convicted did not contain this information, and bills of particulars requesting this information had been denied, may the said convictions stand?

2. Where Petitioners were convicted in a trial in which they were tried simultaneously on three indictments, one charging conspiracy and two charging the substantive offenses growing out of the conspiracy—and the conspiracy indictment has been held by the reviewing court to be inapplicable to them because it placed them in double jeopardy—may the convictions under the substantive indictments be permitted to stand where the evidence on the substantive offenses was completely intermingled and indistinguishable from the evidence on the conspiracy?

3. Where an Affidavit and Motion for change of judge (for bias and prejudice) has been filed pursuant to 28 U.S.C. Section 144, and the trial judge refuses to disqualify himself, should the appellate Court restrict itself to reviewing the legal sufficiently of the Affidavit and Motion, or should it examine the record of the entire proceeding to determine whether the trial judge was biased and prejudiced? And if so, what is the test for reversal?

4. The district in which the trial was to be held had been saturated in the weeks immediately preceding trial with publicity unfavorable to Petitioners in newspapers, radio and television. (R. 52; Original Exhibit A, Case No. 13800, on file with the Clerk).

Some of this unfavorable publicity originated from the trial judge (R. 12-13).

Moreover, the trial judge recognized the extent to which the portending trial had been publicized (R. 44, 208-9).

A timely motion for transfer to another district (R. 93, 105, 132) was denied (R. 96, 107, 135).

Thereafter, in the selection of the jury, 22 prospective jurors were dismissed by the Court for prejudice (R. 244 *et seq.*).

The question presented is: Under these circumstances was the right of the Petitioners to a fair trial safeguarded, or should their motion for transfer to another district have been granted?

5. Where a conspiracy has been characterized by the Courts and the Government as one scheme, and where in the execution of this scheme two penal statutes are violated, may the conspirators be penalized twice, or is their punishment limited to "the single penalty" as this Court held in *Braverman* v. *United States*, 317 U. S. 49?

6. Does the phrase "juror * * * authorized * * * to hear or determine any question, matter, cause, proceeding, or controversy", as used in 18 U.S.C. Sec. 206, mean a person who is merely a member of a jury panel and at best a prospective juror, or does it mean only a person who has been sworn and selected to sit on a particular jury to determine a specific case?[1]

7. Where the judge before whom a guilty plea has been entered is not shown to be "by reason of absence from the district, death, sickness or other disability * * * unable to perform the duties to be performed by the Court after a verdict or finding of guilt", may another judge impose sentence, or does such a procedure violate Rule 25, Federal Rules of Criminal Procedure?

8. Where the trial court fails to afford the defendant an opportunity to make a statement before being sentenced, must the judgment be reversed because of the requirement of Rule 32(a), Federal Rules of Criminal Procedure, that "Before imposing sentence the court *shall* afford the defendant an opportunity to make a statement on his own behalf . . ."?

9. If the points raised under Questions 2, 3, 4, 7 and 8, *supra*, do not, when considered separately, indicate a denial of due process, do they not, when considered together, so taint a proceeding in their cumulative effect as to require that Petitioners be afforded a new trial?

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[1] This same question would apply to the phrase "any grand or petit juror * * * in the discharge of his duty" as used in 18 U.S.C. Sec. 1503, and this point may also be raised if certiorari is granted.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The various constitutional and statutory provisions and the Rules of the Federal Rules of Criminal Procedure involved in this case are set out in Appendix E, Joint Appendix, p. 33.

STATEMENT

This case involves the trial of Petitioners, along with other defendants (including Petitioners William Calvaresi and Jerry Benallo, Jr., in No. 538, October Term, 1954), on a series of indictments charging violations of Title 18 U.S.C. Sections 206 and 1503—offering bribes to jurors, and impeding the administration of justice—and also conspiracies to do these forbidden acts in violation of 18 U.S.C. Section 371. (See Indictments, R. 85, 102, 112, 148). These alleged efforts and conspiracies centered about the trial of Petitioner Eugene Smaldone on a tax evasion charge which began in June 1953 and ended in a mistrial; and which was scheduled for retrial on September 21, 1953. (R. 112-113, 149).

A. The Indictments

Beginning on September 21, 1953, a series of indictments were returned against Petitioners charging either substantive offenses or conspiracies. This Petition is concerned primarily with the indictments and proceedings in Cases Numbered 13794, 13795, 13800 and 13833. Case No. 13794 (R. 85) charged Petitioner Eugene Smaldone in sixteen counts with offering bribes to jurors and obstructing due administration of justice. Case No. 13795 (R. 102) charged Petitioner Clyde Smaldone in six counts with similar offenses. Case No. 13800 (R. 112) charged both Petitioners along with others with conspiracy to offer bribes and to obstruct due administration of justice. On October 1, 1953, Petitioners pleaded not guilty to each of these three indictments (R. 91, 105, 122).

On October 16, 1953 a new indictment against the Petitioners along with others was returned in Case No. 13833 (R. 148). This indictment was in two counts which "were identical in substance with the corresponding two counts of indictment Number 13,800" (App. A, Joint Appendix, p. 15). On October 21, 1953, Petitioners pleaded guilty to both counts of this conspiracy indictment (R. 158-159, 162).

B. Defense Motions Prior to Trial

On October 15 and 16, 1953, prior to trial, Petitioners filed the following motions:

(1) Affidavit and Motion for a change of judge (R. 18-24, 93, 105, 132).

(2) Motion to transfer to another district (R. 52-53, 93, 105, 132), supported by an exhibit of a group of original newspaper clippings (Original Exhibit A, Case No. 13800, on file with the Clerk, Supreme Court of the United States).

(3) Motion for a bill of particulars (R. 92, 106, 122-124).

The motion for a change of judge was predicated on exhanges between defense counsel and the trial judge (The Honorable Willis W. Ritter) in various preliminary proceedings which the Tenth Circuit acknowledged "evidenced the existence of some feeling between court and counsel" (App. A, Joint Appendix, pp. 12-13); on the announced attitude of Judge Ritter to the charges and the Petitioners (App. F, Joint Appendix, p. 46); and on the fact that "excessive bond was required in some instances" (App. A, Joint Appendix, p. 13). In the Tenth Circuit, it was also urged as further supporting grounds, that *all* defense motions had been overruled by Judge Ritter; that he had overruled motions for judgment of acquittal and to dismiss *without opportunity of argument;*

and that the sentences he imposed were "very severe" (App. A, Joint Appendix, p. 13).

The motion to transfer to another district was made because of the inordinate amounts of publicity substantially all of which was unfavorable to the Petitioners which had been given the case by newspapers, radio and television before it came to trial (R. 52-3; see also Exhibit A., Case No. 13800, on file with the Clerk of this Court). In support of this motion it was contended that this publicity had been so great and so unfavorable to the defendants that it "should cause every literate juror to have an opinion" and the defendants would thereby be deprived of a fair and impartial trial (R. 52). When the point was again argued in the Tenth Circuit, it was also pointed out that twenty-two jurors were dismissed by the Court for prejudice. (Consolidated Brief of Appellants in the Court of Appeals for the Tenth Circuit, p. 6; and see R. 244 *et seq.*)

The motions for bills of particulars naturally varied in each case. All commonly requested that the United States be ordered to provide the names and residences of the jurors mentioned in the various counts, and the manner and method alleged to have been used to influence or bribe them (R. 92, 106, 122-4).

All these motions—for change of judge, of venue, and for bills of particulars—were denied by the Trial Judge. (R. 96, 107, 135) and his denial was sustained by the Tenth Circuit (App. A, Joint Appendix, pp. 11-14).

C. Government Motions Prior to Trial

On October 22, 1953—four days before the trial was scheduled to begin—the United States filed motions to join Cases Numbered 13777, 13778, 13794, 13795, 13796, 13797, 13801, 13802, and 13800 for trial (R. 69, 106, 132); and to sever the Petitioners from trial in Case No. 13800 because they had "entered pleas of guilty to a similar conspiracy indictment in Case No. 13833" (R. 133). On the

following day, the United States filed another motion to consolidate, requesting that Cases Numbered 13794, 13795 and 13800 be joined for trial (R. 93-4).

On the day the trial was scheduled to begin—October 26, 1953—the United States made an oral motion to withdraw its previous motions relating to consolidation and severance and moved orally instead to consolidate Cases Numbered 13777, 13778, 13794, 13795 and 13800 (R. 229). Cases Numbered 13777 and 13778 were substantive cases against the Petitioners in No. 538, October Term, 1954 (R. 10, 75). Cases Numbered 13794 and 13795, as we have noted, were substantive cases against the instant Petitioners. Case No. 13800 was a conspiracy case against the instant Petitioners, the Petitioners in No. 538, and others. All of the Government's motions were granted by the Court (R. 229, 238); and Petitioners' request for a continuance on the ground that they had come to trial unprepared to defend against the conspiracy indictment (Case No. 13800) because the Government had moved earlier that they be severed from the case, was denied (R. 242-3).

D. The Motion to Show Cause for Contempt

On October 26, 1953, the first day of the trial (R. 172-3), without prior notice to or service on Petitioners (R. 189), the United States moved by an order to show cause that all defendants in the consolidated trial be held in criminal contempt for the same acts as were alleged in the indictments (R. 172-3). The Trial Judge granted this motion (R. 174, 190) and took all the defendants into *immediate custody* and set the matter down for *immediate hearing* along with the consolidated trial under the indictments (R. 174). When objections were raised by defense counsel to the form and sufficiency of the notice and motion (R. 195-207), the Trial Judge suggested to the United States Attorney that the "Motion and Notice be re-examined with a view to bringing it into conformity

with the provisions of 42-B [Federal Rules of Criminal Procedure]" (R. 207). On the following day, October 27, 1953, the Trial Judge issued a new order superseding his order of the previous day, directing the defendants to appear on November 2, 1953 to show cause why they should not be punished for contempt (R. 175).

At the conclusion of the trial, the Trial Judge held all defendants guilty of criminal contempt (R. 480), distinguishing this Court's decision in *Nye* v. *United States*, 313 U.S. 33, and relying upon *O'Malley* v. *United States*, 128 F. 2d 676 (CA 8), (R. 474-9). The Tenth Circuit reversed the district court on this question holding that the *Nye* case governed (App. A, Joint Appendix pp. 23-5), and ordered the contempt proceedings dismissed (App. A, Joint Appendix, pp. 25-6).

E. The Plea of Former Jeopardy

On October 26, 1953, Petitioners filed pleas of former jeopardy in Cases Numbered 13800 (conspiracy), 13794 (substantive—Eugene Smaldone) and 13795 (substantive—Clyde Smaldone), on the ground that the charges in these cases were encompassed in Case No. 13833 where they had already entered pleas of guilty (R. 94, 107, 133-134), and objected to proceeding with the trial before disposition of this plea; for if their plea was sustained, once the trial began they would be in jeopardy twice for the same offense (R. 235, 240). Other of the defendants also objected to proceeding with the trial before the plea was disposed of on the ground that being tried in the same trial on the same offenses to which two of their co-defendants had already pleaded guilty constituted highly prejudicial joinder (R. 232-233). Nevertheless, the trial judge reserved his ruling (R. 135), ordered the trial to proceed and, at its conclusion, overruled the plea. (R. 472).

On appeal, the Tenth Circuit held that the plea of former jeopardy should have been sustained in Case Number 13800 but was properly overruled by the district court

in the substantive cases, 13794 and 13795. (App. A, Joint Appendix, pp. 15-16). Petitioners' convictions in Case Number 13800 were reversed and that cause was ordered dismissed as to them (App. A, Joint Appendix, p. 25).

F. Bail

In the days between the indictments and the commencement of the trial, and while all that has been heretofore described was taking place, the Judge was setting bail in the various cases, and efforts were being made to reduce the bail established by him. Since the instant Petitioners did not apply for reduction of bail, the details relating to bail are not detailed here, but are more completely set out under Points 2, 4, and 5, Appendix F, Joint Appendix. It is sufficient to note that at the time of trial, bail for the instant Petitioners, Eugene and Clyde Smaldone, had been set in the amounts of $1,200,000.00 and $1,100,000.00, respectively.[2]

G. The Selection of the Jury

As noted under B, *supra*, p. 6, Petitioners' motion for a transfer to another district was based upon the great amount of unfavorable publicity given the case before it came to trial. This contention appeared to have been born out in the selection of the jury: of the 57 prospective jurors called, 22 were dismissed by the Court for prejudice (R. 243-321). The Court's questioning of the first prospective juror is illustrative. That person admitted

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[2] These amounts are derived from references throughout the record as follows: (1) For Eugene Smaldone—13775 (Consp.) $100,000; 13776 (Subst.) $100,000; 13779 (Consp.) $100,000; 13792 (Consp.) $100,000; 13793 (Consp.) $200,000; 13794 (Subst.) $200,000; 13800 (Consp.) $200,000; 13833 (Consp.) $200,000.

(2) For Clyde Smaldone—13779 (Consp.) $100,000; 13780 (Subst.) $100,000; 13792 (Consp.) $100,000; 13793 (Consp.) $200,000; 13795 (Subst.) $200,000; 13800 (Consp.) $200,000; 13833 (Consp.) $200,000.

And there are other cases still pending, not yet tried and not a part of this record, in which additional bail was also set.

having read about the case "several times" in the newspapers and having heard about the case many times on the radio during "the past several weeks"; and he admitted having formed an opinion about the matters involved in the case (R. 247), to such an extent he did not believe he "could render a fair decision" (R. 248). Twenty-one other talesmen testified similarly. (R. 246-8, 250-1, 252-3, 254-5, 256-7, 258, 258-9, 261, 259-260 and 272, 282-3, 283, 284, 285, 288-90, 292-3, 293, 300-1, 301, 318-20, 320).

H. The Trial and the Sentences

The consolidated trial joined together five defendants under five indictments.[3] Four of the indictments charged substantive offenses; and the fifth indictment charged conspiracy. All but one of the defendants[4] was being tried simultaneously for substantive offenses and conspiracy.

Such a mass trial necessarily engendered confusion and there were frequent objections by Petitioners, as well as the other defendants, that evidence which was coming in did not apply to them (R. 358, 363, 375, 381) or that there was no connection between the testimony offered and the charges in the indictments (R. 422, 424, 429).

All defendants were found guilty on all charges in all indictments, and all defense motions were overruled. Moreover, all defendants were held guilty of criminal contempt.

The Petitioners were sentenced as follows:

> (1) Eugene Smaldone—in Case No. 13794, to a total of 160 years, of which 110 years were suspended, leaving 50 years and, in addition, a fine of $24,000; in Case No. 13833, to a total of 10 years; in Case No. 13800, to a total of 10 years, which was suspended. The aggregate was 60 years and $24,000. (R. 482-3).

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[3] In addition, the criminal contempt proceeding was simultaneously being tried to the Court.

[4] Michael Benallo was charged only as a member of the conspiracy, and there was no substantive case against him.

(2) Clyde Smaldone—in Case No. 13795, to a total of 60 years, of which 10 years were suspended, leaving 50 years and, in addition, a fine of $24,000; in Case No. 13833, to a total of 10 years; in Case No. 13800, to a total of 10 years, suspended. The aggregate was 60 years and $24,000 (R. 484-5).

In addition, each of the Petitioners were sentenced on the contempt "to the same terms in the Federal Penitentiary and to the same fines * * * upon which you have already been sentenced, and the Court suspends the sentences in the contempt matter, conditioned upon serving the sentences and the paying of the fines in the other matters". (R. 487).

At the sentencing, Judge Ritter, the Trial Judge, insisted, over objection, upon sentencing the Petitioners in Case No. 13833 despite the fact that they had entered their pleas of guilty before Judge Knous; and there is nothing to indicate that Judge Knous was not available to do this (R. 482-3). Indeed, so brusque was the sentencing proceedings, that neither the Petitioners nor any of the other defendants were offered an opportunity to make a statement or present information in mitigation of punishment (R.482-7),[5] although the Judgment and Commitment in each instance which Judge Ritter signed indicates that they were.[6]

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[5] Rule 32(a), Federal Rules of Criminal Procedure, App. E, Joint Appendix, p. 36, provides in relevant part:

> "Before imposing sentence the court *shall* afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment". (Emphasis added).

[6] The Language of the commitments states in relevant part as follows:

> "* * * and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, * * *" (R. 98, 107-108, 136-40)

I. The Rulings of the Court of Appeals

The appeal to the Court of Appeals was taken on a consolidated record and brief filed by all the defendants. While that Court commended the appellants for so proceeding because it "has greatly lightened our work in considering the issues presented", (App. A, Joint Appendix, p. 3), as will subsequently appear, this consolidated appeal also resulted in confusion and substantial appellate errors.

The Court of Appeals reversed the trial court in the following particulars:

(1) It held the contempt proceedings improper and ordered them dismissed as to all defendants.

(2) It held Petitioners' plea of double jeopardy to be good in Case No. 13800, and accordingly ordered their convictions in that case reversed and the cause dismissed as to them.

(3) It reversed the conviction of Micheal J. Benallo as being completely unsupported by the evidence.

(4) It reversed the convictions of Petitioner Eugene Smaldone on eight of the sixteen counts in Case No. 13794 on the ground that there was no evidence to support the verdicts or judgments.

In all other respects, it affirmed the rulings and judgments of the District Court.

REASONS FOR GRANTING THE WRIT

I

In the Court below, Petitioners attacked the indictments on the ground that they "were not sufficient in law and failed to charge an offense against the laws of the United States". *Point One, Consolidated Brief of Appellants,* Court of Appeals for the Tenth Circuit. pp. 19 *et seq.* The claim was that "they are all equally vague, indefinite, and represent masterpieces of generality."

Id. at p. 20. The primary complaint was that the indictments charged Petitioners with having " 'contacted a petit juror' or 'contacted a friend of a petit juror', alleged dates of the various 'contacts' are stated, but in no instance is the name of any 'petit juror' mentioned, nor the name of any 'friend' of any petit juror". *Ibid.* Petitoners contended further that there had been no showing of

> "* * * how many prospective jurors were summoned on the panels * * * The indictment left to pure guesswork what petit jurors were involved, as well as what friends of said jurors had been 'contacted' ". *Ibid.*

And this attack went to all the indictments, substantive and conspiracy alike, as the references in the briefs for Appellants and Appellee below make plain.[7]

The Court below treated this assignment of error as if it were limited to conspiracy indictment No. 13800, although recognizing that the "appellants state in general that the *indictments* failed to state an offense against the United States." (App. A, Joint Appendix, p. 7) (Emphasis added). But this selection, as will appear, was unfortunate because it led the Court into a serious error which appears on the face of its own opinion.

Having selected indictment No. 13800, which charged conspiracy, it limited its consideration of the attack for vagueness to a determination of whether the "indictment fails to set out the essential elements necessary to constitute the offense of conspiracy * * *." *Ibid.* Observing that the "primary complaint is that the indictment refers to petit jurors only in general; that it fails to show how many petit jurors were summoned on the panels and left to pure guesswork what petit jurors were involved, as well as what friends of said jurors had been contacted," *Ibid;* it answered:

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[7] Consolidated Brief of Appellants, Court of Appeals for the Tenth Circuit, pp. 19, 20, 24, 25, 32, 33, 34. Brief of Appellee, pp. 18 et seq.

> "This argument overlooks the essence of the offense of *conspiracy*. The gist of the offense charged is the unlawful *agreement* and *understanding* between the defendants that they would tamper with members of the panel of jurors. How many or which jurors were to be contacted *was not a part of the offense of conspiracy.*" *Id.* at 7-8. (Emphasis added).

The Court then examined the language of Indictment No. 13800 and concluded that there was no uncertainty with what the Petitioners were charged. "They were charged with *conspiring* to tamper with a particular jury, particularly described, and to be used in a particular case, the name of which was given and the date on which the case was to be tried was set out in the indictment." *Id.* at 8. (Emphasis added).

The Court then went on to state:

> "What individual jurors, or how many, or what friends of prospective jurors they undertook to contact *would become material only when they went to trial for the substantive offenses.*" *Id.* at 8-9. (Emphasis added).

Apparently, because it had been addressing itself to Case No. 13800 charging conspiracy, the Court below did not realize that it had before it also the indictments in Cases Numbered 13794 and 13795, charging the substantive offenses, on which Petitioners had gone to trial, had been convicted, and to which their attack for vagueness also ran. The Court, later in its opinion, merely tested the indictments in these cases against the evidence in the record and held: with regard to Case No. 13795, "each of the six counts is supported by competent evidence" (App. A, Joint Appendix, p. 21); and with regard to Case No. 13794, that the "record supports the verdict and judgment of conviction entered thereon on counts one, three, five, six, seven, thirteen, fourteen and fifteen * * *." (*Id.* at p. 20).

We have thus the anomalous situation of a court indicat-

ing clearly that indictments lacking certain material information would be insufficient, and at the very same time sustaining convictions predicated on indictments which lack the information which it has itself held to be material as to them.

The indictments in Cases Numbered 13794 and 13795 charging substantive offenses against Petitioners (R. 85, 102) do not indicate "what individual jurors, or how many, or what friends of prospective jurors they undertook to contact", which, according to the Court below are "material" allegations in trials for substantive offenses. (App. A, Joint Appendix, pp. 8-9). Yet Petitioners went to trial on these offenses, were denied bills of particulars requesting this "material" information (R. 96, 107), were convicted for these offenses (R. 98, 107); and the Court below in apparent inadvertence not only sustained the trial court's denial of bills of particulars, but also sustained these substantive convictions (App. A, Joint Appendix, pp. 20, 21, 25-26).

Had the Court below actually subjected the indictments in Cases Numbered 13794 and 13795 to the test of sufficiency —which it had itself recognized—that the indictments must be specific enough so as to protect the Petitioners from being placed in jeopardy for the same offense a second time,[8] it would have been compelled to hold these indictments insufficient on their face. Since none of the counts in either indictment name the jurors or friends of jurors whom the Petitioners allegedly sought to contact, Petitioners would be unable to plead these indictments as a bar to future prosecutions based upon the same subject matter. And this is particularly consequential because other indictments charging these Petitioners with offenses similar to those involved in this proceeding are still pending and awaiting trial in the District Court.

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[8] App. A, Joint Appendix, p. 7. See *Hagner* v. *United States*, 285 U.S. 427, 431. See also *Barone* v. *United States*, 205 F. 2d 909, 912 (C.A. 8); *Butzman* v. *United States*, 205 F. 2d 343, 348 (C.A. 6), *cert. den.* 346 U.S. 828; *Todorow* v. *United States*, 173 F. 2d 439, 447 (C.A. 9).

This was clearly a "plain error" and a "defect" "affecting substantial rights", within the meaning of Rule 52(a), *Federal Rules of Criminal Procedure, infra;* cf., Rule 40, 1. (d) (2) *Revised Rules of the Supreme Court; Wiborg* v. *United States,* 163 U.S. 632, 658, and cannot be permitted to stand.[9] In this respect, the decision below is clearly erroneous and this Court, in the exercise of its "supervisory authority over the administration of criminal justice in the federal courts", *McNabb* v. *United States,* 318 U.S. 332, 341; cf., *Offutt* v. *United States,* No. 27, October Term, 1954, U.S. ; should accept the case for review.

II.

Petitioners' trial proceeded simultaneously on three indictments, two charging substantive offenses and one charging the related conspiracy. Prior to the trial, however, Petitioners had pleaded guilty to a conspiracy indictment which was identical (R. 158); and at the beginning

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[9] This is not the only error on the face of the opinion below. At p. 21, Appendix A, Joint Appendix, where the Court was discussing the substantive indictment against Clyde Smaldone in Case No. 13795, it equated Counts 1 and 3 of that indictment to Counts 5 and 13 of the substantive indictment against Eugene Smaldone in Case No. 13794. Counts 1 and 3 of No. 13795 refer to acts occurring on September 2 and 10, respectively (R. 102-3); but Counts 5 and 13 of No. 13794 refer to acts occurring only on September 2 (R. 87, 90). Count 3 in 13795 does not therefore equate with Count 13 of 13794.

Undoubtedly, the Court meant to equate Count 3 of 13795 with Count 15 of 13794 (R. 90); but later in its opinion it equates Counts 2 and 4 of 13795 with Counts 7 and 15 of 13794 (App. A, Joint Appendix, p. 21), and this appears to be correct. Only Count 16 of 13794 (R. 91) is left to be equated with Count 3 of 13795, but Count 16 was held to be duplicitous and the conviction based upon it was reversed (App. A, Joint Appendix, p. 20). Clyde Smaldone's conviction on Count 3 of 13795 is thus left suspended in mid-air with nothing to support it in the record.

And no good reason appears why Counts 3 and 4 of No. 13795 are not just as duplicitous as the Counts in 13794 which the Court below held to be duplicitous (App. A, Joint Appendix, pp. 19-20).

of this trial pleaded the bar of double jeopardy. (R. 235-240). This plea was held for decision by the trial judge pending the completion of the trial, and at that time was summarily denied. (R. 472).

A. *Double Jeopardy In Fact.* The Court below reversed the denial of the plea of double jeopardy and pointed out that the mandatory language of the Fifth Amendment "in plain language means that one may not be tried a second time for the same offense and that was done with respect to Indictment No. 13800 over the protest and objection of these two appellants." (App. A, Joint Appendix, p. 16). In confining its reversal to the single conspiracy indictment, the Court was posing only part of the double jeopardy issue actually raised on this record.

The Court below should have ruled that the entire trial violated the standards established by the Constitutional proscription against putting any person in jeopardy a second time. Being tried on the other indictments which were coupled with Indictment 13,800, was just as much a violation of the Fifth Amendment as being tried on 13,800. The Court below corrected one form of double jeopardy error; but it failed to perceive another and equally insidious form.

Since the Court below correctly held that the trial judge should have granted the plea of former jeopardy when it was made, before the commencement of the trial, it should have held that all that followed this erroneous ruling was a deprivation of Petitioners' Constitutional rights. The entire trial, and not only the single indictment of conspiracy,[10] should have been reversed as a transgression against the Fifth Amendment's commandment.

The failure of the trial judge correctly to rule at the outset that the Fifth Amendment barred the trial of the

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[10] The court below held that the plea of double jeopardy did not encompass the substantive indictments of 13,794 and 13,795. That may be so; but Petitioners are entitled to a new trial on them.

conspiracy indictment necessarily meant that the entire trial proceeded on an illegal basis and in fact placed Petitioners in double jeopardy. When the judge and jury throughout a trial are under a wholly erroneous impression as to the precise indictments upon which defendants are being tried, the entire trial is tainted with inevitable error; it is impossible to reconstruct what would have occurred had the correct ruling been made. The decision of the Court below could not and did not remove the pervasive effects of the error. The failure of the trial judge to give full legal recognition to prior proceedings involving the defendants must be reversed by this Court, cf. *Sealfon* v. *United States*, 332 U. S. 535, because the entire trial was indelibly stamped with error and unfairness. The defendants certainly have not had the fair trial to which the most elementary concepts of due process would entitle them.

B. *Prejudicial Commingling of Evidence.* It is self-evident that conspiracy indictments are more general in scope, and the proof required for conviction thereunder can be more indirect and circumstantial, than that involved in substantive offenses. Cf. *Old Monastery Co.* v. *United States*, 147 F. 2d 905, 906 (C.A. 4) *cert. den.* 326 U. S. 734. The degree to which prosecutors have eagerly availed themselves of a joinder of broad conspiracy counts with substantive counts, to insure for themselves some conviction of particular defendants, has been the subject of unfavorable comment by Justices of this Court. See *e.g.*, *Krulewitch* v. *United States*, 336 U.S. 440, 445-458 (concurring opinion); *Report of Conference of Senior Circuit Judges*, 1925, cited in *Pinkerton* v. *United States*, 328 U.S. 640, 644 at fn. 4. Even where this Court has evidence, offered in a trial in which conspiracy and substantive offenses are joined, to apply to the substantive offense, or has upheld the use of admissions or declarations of one co-conspirator against another, it has been careful to point out that the trial judge must be circumspect in his admis-

sion of such evidence. See, e.g., *Lutwak* v. *United States*, 344 U. S. 604, 619, where the majority of this Court warned, "These declarations must be carefully and clearly limited by the court at the time of their admission and the jury instructed as to such declarations and the limitations put upon them. Even then, in most instances of a conspiracy trial of several persons together, the application of the rule places a heavy burden upon the jurors to keep in mind the admission of certain declarations and to whom they have been restricted and in some instances for what specific purpose."; and the dissenting opinion in that case decried the fact that "one of the additional leverages obtained by the prosecution through proceeding as for conspiracy instead of as for the substantive offense is that it may get into evidence against one defendant acts or omissions which color the case against all." (344 U. S. at 623).

The record in this case does not indicate any meticulous judicial identification of the evidence admitted. The record gives no indication that the trial judge was concerned to define which evidence applied to which indictments and which defendats. On the contrary, it displays a complete intermingling of all the evidence on all the defendants and on all the indictments. This trial was as indivisible as one ball of wax. It is impossible to eradicate the effects of the evidence which should have been confined solely to the conspiracy charges from the entire judicial process at the trial which resulted in the mass convictions.

In its consideration of this issue, the Court below cut itself off abruptly at the point where it reversed the judge for failure to grant the plea of double jeopardy in Case No. 13800. It should have proceeded to consider the overall effects of permitting a trial to proceed when one of the indictments involved in its integral proceedings was in fact barred because of double jeopardy; and wherein evidence was admitted on the substantive counts which might well have been excluded had the plea of double jeopardy been honored at the proper time. Indeed, the Court below

could properly have held that the mere fact that the jury could consider, as against the Petitioners, the *indictment* in Case No. 13800—with 22 overt acts set out under each of the two counts—while they were weighing the guilt of the Petitioners on the substantive cases, constituted prejudicial error. While we believe such an error would saturate a trial with impropriety and lack of regard for defendants' rights under any indictment and before any judge and jury, we must observe that this is especially true under the special circumstances of this case. (See Points I and III). To insure that the essentials of due process under the Fifth Amendment will be maintained where a valid plea of former jeopardy was entered, this Court should grant certiorari and indicate the extent to which an erroneous denial of such a plea vitiates the subsequent trial and the evidence admitted therein.

III

Questions 3 and 4 of the Questions Presented, p. 3, *supra*, raise important issues which go to to the manner in which a criminal prosecution is to be conducted where unpopular defendants are brought to trial on charges which arouse public passion, in an atmosphere inflamed by prejudice, and where the trial judge himself evidences in his attitude and comportment an attitude which is far from impartial.

The record in this case amply demonstrates that both judge and jury completely lost sight of this Court's admonition in *Ex parte Quirin*, 317 U.S. 1, 25: "Constitutional safeguards for the protection of all who are charged with offenses are not to be disregarded in order to inflict merited punishment on some who are guilty." That the essentials of a fair trial embodied in the Constitution were disregarded in this case is illustrated by the refusal of the trial judge, sustained by the Court below, to grant a change of venue and to recuse himself for bias and prejudice.

A. *Motion for Transfer to Another District.* Prior to the commencement of this trial all defendants moved to

transfer the trial to another district (R. 52-3), urging that the District of Colorado had been saturated with unfavorable publicity by radio, television and the press; that Petitioners had been stigmatized as gangsters and outlaws; and that no jury sitting in the District could be free from fatal prejudice against them. The Judge recognized that these were allegations of substance and that "it certainly would be a travesty on justice if we held a trial here with no expectation at all that the defendants might be found innocent." (R. 208-209). Nevertheless, he denied the motion, evidently believing that it was possible for an impartial jury to be selected.

The Court below did not discuss the denial of the motion for transfer of the trial as such, but did hold that "There is no *affirmative* evidence in the record that any juror had a bias or prejudice against any of the defendants which would prevent him from discharging his duty as a juror." (App. A, Joint Appendix, p. 13) (Emphasis added.[11]

Neither the Court below nor the trial judge, in ruling on this point, made any reference to the newspaper articles about the Petitioners and the trial which had been circulated throughout the District in the period before trial, and which were submitted as Exhibit A to the Motion for Transfer. (R. 52). This Exhibit, which was before both Courts below, is on file with the Clerk of this Court, and we respectfully urge this Court at least to savor its flavor and note its volume.

The question of the extent to which widespread adverse publicity may deprive a defendant of a fair trial has been arising with increasing frequency in recent years; and this Court has not as yet set forth the principles to be applied

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[11] It should be noted, however, that the Court below reversed convictions on 8 of the 16 counts in Case No. 13794 because "there is no evidence to support the verdict" (App. A, Joint Appendix, p. 20); and also reversed the conviction of Micheal J. Benallo in Case No. 13800 because the "record does not reveal a single bit of evidence" tying him to the conspiracy (*Id.* at p. 22).

in such cases. This Court's concern up to now has been primarily directed to the problem on the other side of the medallion: whether publicity and pressure upon the public, the judge or the jury, which may effect the impartiality of a judicial proceeding, justifies the use of the contempt power against the offending news organ. Cf., *Baltimore Radio Show* v. *Maryland,* 338 U.S. 912; *Craig* v. *Harney,* 331 U.S. 367; *Pennekamp* v. *Florida,* 328 U.S. 331; *Bridges* v. *California,* 314 U.S. 252. See generally, *Note,* 59 Yale L.J. 534. There is no claim in this case that any action of the press was contemptuous.

In *Stroble* v. *California,* 343 U.S. 181, 191-195, a majority of this Court did reject a contention that a newspaper account of a confession so tainted a trial as to deprive the petitioner of due process, for a number of specific reasons; but that case, which reviewed a State conviction under the Fourteenth Amendment, was evidently not regarded by this Court as an appropriate vehicle for establishing the standards whereby the *federal* courts could protect the rights of defendants in a community atmosphere moulded by antagonistic publicity.

The factors absent in *Stroble* are present here. This, of course, is a case which arose under federal statutes and was tried and reviewed in federal courts. Petitioners did move for a change of venue; the failure to make such a motion was characterized as "significant" even if not "dispositive" in *Stroble,* 343 U.S. at 194. Further, and in contrast to the findings made on each point in *Stroble,* 343 U.S. at 195, in this case the unfavorable publicity continued up to the date of trial, was not limited to a single episode, and was not voluntarily revealed, (Original Exhibit A, Case No. 13800 on file with the Clerk); and an affirmative showing of bias as regards the jury was manifested by the fact that 22 of the 57 prospective jurors questioned admitted prejudice, while the others indicated that they had heard of or read about the case they were about to try. (R. 244-322). Moreover, this case contains an additional feature: the trial judge was actually ordering

"information to be given to the Press". (R. 12-13). We submit that this is an appropriate case for this Court to establish the principles which should govern the federal courts in dealing with this issue. See *Stroble* v. *California*, 343 U.S. 181, 191-195, 198-202; *Shepherd* v. *Florida*, 341 U.S. 50 (concurring opinion); *State of Maryland* v. *Baltimore Radio Show*, 338 U.S. 912 (opinion on denial of cert.).

The pressing nature of the problem is manifested by the fact that more and more of the federal courts have been called upon to make, and have made, decisions on the issue. In *Delaney* v. *United States*, 199 F. 2d 107 (C.A. 1), the First Circuit held that the trial judge had abused his discretion by proceeding with the trial and not granting an indefinite continuance, when the publicity generated by a Congressional committee hearing still dominated the public conception of the defendant. "It is fair to say that, so far as the modern mass media of communication could accomplish it, the character of Delaney was pretty thoroughly blackened and discredited as the day approached for his judicial trial on narrowly specified charges." 199 F. 2d at 111.

And other federal courts have adhered to the approach taken in *Delaney*: E.g., *United States* v. *Florio*, 13 F.R.D. 296 (S.D.N.Y.) where a change of venue was granted because of articles labelling the defendant as a "mobster" and "racketeer" appearing in the press on the morning of the trial. *Cf., Application of Electrical, Radio and M. Workers*, 111 F. Supp. 858, 869 (S.D.N.Y.). Other decisions have made one distinction or another to justify the denial of a change of venue: (1) newspaper articles cited by counsel not part of record, *Schino* v. *United States*, 209 F. 2d 67, 70-1 (C.A. 9), *cert. den.* U.S. ; *United States* v. *Moran*, 194 F. 2d 623, 625 (C.A. 2); (2) adverse publicity did not persist through months immediately preceding trial, *United States* v. *Rosenberg*, 200 F. 2d 666, 668-70 (C.A. 2); *United States* v. *Carper*, 13 F.R.D. 483, 486 (D.C.D.C.); (3) only two of the twelve jurors selected had read anything about the case, *United States* v. *Moran, supra;* (4) failure

to timely move for transfer, *United States* v. *Rosenberg, supra;* but none of these distinctions apply in this case.

The trial judge denied the motion to transfer in the hopes that a jury "that hasn't been biased or prejudiced" could be selected from "a large panel." He recognized the difficulties of the situation, that "a good deal of unfortunate publicity has gotten out about this" but thought nevertheless, "we ought to try it". His suggested *modus operandi* was to carefully question the members of the jury panel because he believed "that a juror answers truthfully". (R. 208-9). But this was precisely the procedure upon which the First Circuit, in the *Delaney* case, *supra,* frowned.

> ". . . No doubt the district judge conscientiously did all he could, both in questions he addressed to the jurors at the time of their selection and in cautionary remarks in his charge to the jury, to minimize the effect of this damaging publicity, and to assure that defendant's guilt or innocence would be determined solely on the basis of the evidence produced at the trial. But • • • one cannot assume that the average juror is so endowed with a sense of detachment, so clear in his introspective preception of his own mental processes, that he may confidently exclude even the unconscious influence of his preconceptions as to probable guilt, engendered by a pervasive pre-trial publicity • • • (199 F. 2d at 112-113). Since he was obliged to stand trial in the hostile atmosphere engendered by the extra courtroom publicity, he had little or no reason for assuming that one juror rather than another would be more likely to be influenced, consciously or unconsciously, by his preconceptions • • •" *Id.* at 116.

The Second Circuit, too, has just recently underscored the importance of not accepting statements of members of a panel that they were not "influenced", when these statements run counter to "human nature being what it normally is". *United States ex rel. Accardi* v. *Shaughnessy,* (C.A. 2) (decided January 7, 1955) *on remand from this Court,* 347 U.S. 260. In that case, members of the Board

of Immigration Appeals had testified under oath that they had not been influenced by statements made by the Attorney General with regard to the Relator. The trial judge accepted these statements because he could see "no rational ground for disbelieving the witnesses". But the Court of Appeals ordered the decision reversed. Judge Frank wrote:

> "We accept it as a fact that the Board members *consciously* believed, when they testified, that the Attorney General's statements amounted to no more than a calendar order * * * and that, beyond that, those statements did not have any effect on the Board's decisions. But it is incredible, human nature being what it normally is, that the Attorney General's statements * * * did not *unconsciously* influence the Board members * * *. Any other finding involves reliance on so remarkable a degree of improbability as to be untenable".

And Judge Clark, concurring separately, observed:

> "all judges naturally and honestly believe that they are above bias. But the facts shown create a presumption of bias not overcome by the Board's self-serving declaration to the contrary".

If this is the test applied to members of an administrative tribunal specially selected and appointed to make decisions under a particular federal law, it is *at least* applicable to laymen drawn from every walk of life and without prior training and experience in deciding controversies from the evidence before them. The questioning on *voir dire* below certainly creates "a presumption of bias not overcome" by the jury panel members' declarations to the contrary (R. 244 et seq.)

The brief discussion of these recent cases makes it apparent that the issue of a fair forum in which to hold a controversial trial, and the test by which to examine the impartiality—or likelihood of impartiality—of a jury, has been arising with great frequency in recent years in the

federal courts. In the general approach to the safeguarding of a defendant's right to a fair trial, there is a vast difference between the decision in *Delaney, supra,* and the decision of the Court below. And there is also a difference in the factors which should be considered and the emphasis they should be given in determining whether a change of venue should be granted. These views and standards will continue to be diverse, and the fundamental rights of a defendant will vary from court to court, until this Court sets the definitive guideposts. We think this case contains all the ingredients for a clear determination of the problem.

B. *Motion for Change of Judge.* The Court below affirmed the refusal of the trial judge to excuse himself for bias and prejudice, apparently on the twin grounds that when an affidavit is filed under 28 U.S.C. Sec. 144 the judge need do no more than test the legal sufficiency of the allegations; and that various of the trial judge's rulings "standing alone" did not establish bias and prejudice (App. A, Joint Appendix, pp. 12-13). This piecemeal review, analyzing the sufficiency of an affidavit filed prior to trial, and then examining each subsequent ruling in an isolated context, does not comport with the principle that the "right to be tried by a judge who is reasonably free from bias is a part of the fundamental right to a fair trial. If, before a case is over, a judge's bias appears to have become overpowering, we think it disqualifies him." *Whitaker* v. *McLean,* 118 F. 2d 596 (C.A. D.C.)

While the Affidavit in this case may not have been sufficient on its face to require the trial judge to recuse himself, it would seem—and the Court below appears to have recognized—that the sufficiency of the Affidavit was at least debatable.[12] And "where the sufficiency of an af-

[12] While this colloquy shows that the proceedings were acrimonious at times and evidenced the existence of some feeling between the Court and counsel, we do not think it is of such a nature as to show upon its face bias and prejudice." (App. A, Joint Appendix, pp. 12-13).

fidavit is at least debatable, if the judge refuses to disqualify, the reviewing court will consider whether actually in the trial of the case any prejudice was manifested toward the affiant by erroneous rulings or by the manner and demeanor of the judge towards the affiant." *United States* v. *Buck*, 23 F. Supp. 503, 506 (W. D. Mo.).[13]

This the Court below failed to do. It noted, for example, that "the sentences imposed are very severe", but thereafter observed that "*standing alone* the imposition of a sentence which the Court had lawful authority to impose" did not show bias and prejudice. (App. A, Joint Appendix, p. 13) (Emphasis added). Likewise, with regard to complaints made respecting excessive bond, the overruling of *all* of defendants' motions and the denial of argument on motions for acquittal and to dismiss, the Court below held that these "*in themselves alone*" were not sufficient to show bias and prejudice. (*Ibid.*)

The Court below obviously did not take into account the myriad episodes throughout the proceedings which make it plain that the Petitioners were denied the benefits of a trial before an impartial judge. A full catalogue of these episodes is set out in Appendix F, Joint Appendix, pp. 38 *et seq.* They run the full gamut from: setting excessive bail (exceeding a million dollars for each of these Petitioners) (p. 39); giving information of an unfavorable nature to the press (p. 39); refusing to rule on a plea of double jeopardy until after the trial (p. 41); refusing continuances and forcing various defendants to go to trial on matters on which their counsel were justifiably unprepared (pp. 40-41, 42-44); and many others.

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[13] Where an affidavit of bias and prejudice has been filed, and even where appellate courts have affirmed the refusal of the trial judge to recuse himself, they have scrutinized the entire record to insure that there had been no prejudice and bias in the rulings during the course of the actual trial. *Eisler* v. *United States*, 170 F. 2d 273, 281 (C.A. D.C.); *Ferrari* v. *United States*, 169 F. 353, 355 (C.A. 9); *Scott* v. *Beams*, 122 F. 2d 777, 788-789 (C.A. 10). And see also *Connelly* v. *United States District Court*, 191 F. 2d 692 (C.A. 9).

Indeed, the Court below appears not even to have taken into consideration the fact that on three separate occasions in related or interlocutory proceedings *in this case*, it itself had *reversed* Judge Ritter for abusing his discretion: (1) the forfeiture of the bond of Eugene Smaldone in the tax evasion case (p. 38; *Smaldone* v. *United States*, 211 F. 2d 161); (2) reducing the bail set by Judge Ritter for two of the defendants from $400,000 each to $25,000 each (p. 40); and (3) granting bail pending appeal to two defendants after Judge Ritter denied them any bail (p. 40).

We believe that the record in this case plainly lacks what the Sixth Circuit has characterized as the necessary "atmosphere of judicial calm" and, when this is lacking, a case must be remanded for a new trial. *Moskum* v. *United States*, 143 F. 2d 129, 130 (C.A. 6). Indeed, the Sixth Circuit has held that if only to eliminate the "chance" that any unfairness may have existed, a conviction should be reversed and remanded for further proceedings before another judge. *Schmidt* v. *United States*, 115 F. 2d 394, 398 (C.A. 6). And see *Whitaker* v. *McLean*, *supra*.

If *a* "chance" of unfairness is the test for remand, we believe that this test has been more than fulfilled in the instant case. In denying remand, the Court below has apparently adopted a different standard from that followed in other circuits.

Moreover, the Court below did not consider the cumulative effect of these irregularities upon the fairness of the proceedings. By looking at each action "standing alone", it violated this Court's warning that a reviewing court "*must* take into account what the error meant * * * *not singled out and standing alone*, but in relation to all else that happened." *Kotteakos* v. *United States*, 328 U.S. 750, 763. (emphasis added).

IV

In *Braverman* v. *United States*, 317 U.S. 49, this Court in an unanimous opinion delivered by Chief Justice Stone decided the "question whether a single agreement to commit acts in violation of several penal statutes is to be punished as one or several conspiracies". 317 U.S. at 52. The rule laid down in that case was as follows:

> "For when a single agreement to commit one or more substantive crimes is evidenced by an overt act, as the statute requires, the precise nature and extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects. Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes. *The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one.*" 317 U.S. at 53 (Emphasis added).

The two conspiracy indictments involved in the instant case—13800 and 13833—are identical to the one in the *Braverman* case in that they charge—and the evidence at best only proved—"a single agreement". The indictment in *Braverman* was in seven counts "each charging a conspiracy to violate a separate and distinct revenue law". The indictments in this case are in two counts each charging a conspiracy to violate a separate and distinct provision of Title 18: *viz.*, Sections 206 and 1503.

Moreover, in the instant case, "the precise nature and extent of the conspiracy" has been held by the Court below to be a single agreement. "The general scheme was to procure the release of Eugene Smaldone in the criminal case which was pending against him by bribing and corrupting members of the panel from which the specific jurors selected to try the case were to be selected. • • • It was the intent and purpose of the original conspiracy to do what was necessary in the minds of the conspirators to effect such release in the case pending against Smaldone".

(App. A, Joint Appendix, p. 11). "All the Government had to prove was the unlawful agreement to tamper with this specific jury in the manner specifically set out therein, for the purpose of violating the two criminal statutes involved." (*Id.* at p. 8).

And the Government, in its brief below, conceded as much: "the entire matter sprang from one basic purpose and all the transactions were calculated to reach that end". (Brief of Appellee, Court of Appeals for the Tenth Circuit, p. 31). "The crux of the matter is the whole thing was one nefarious scheme". (*Id.* at p. 34).[14]

Despite these analyses, Petitioners' separate convictions on the separate counts of the indictment in Case No. 13833 were permitted to stand.[15] This, because undoubtedly in the confusion arising out of a consolidated trial and appeal of five defendants on five indictments, and because of the multiplicity of the questions involved, this fundamental matter was overlooked by both the trial and appellate courts.[16] Overlooked or not, Petitioners have been convicted and sentenced twice for the same violation—which is precisely what this Court in the *Braverman* case said should not be done.[17]

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[14] While the statements quoted from the Court's opinion and the Government's brief were not directed to the question here presented, they were addressed to the nature of the conspiracy involved, which is the same conspiracy to which the instant point is addressed. This conspiracy cannot be one kind for one argument and another kind for another argument.

[15] As were the convictions of Petitioners William Calvaresi and and Jerry Benallo, Jr., in No. 538, under the indictment in Case No. 13800.

[16] Rule 52(a), Federal Rules of Criminal Procedure provides: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." *Cf.*, Rule 1, (d)(2), Revised Rules of the Supreme Court. And see *Wiborg* v. *United States*, 163 U.S. 632, 658.

[17] "The single agreement is the prohibited conspiracy, and however diverse its objects, it violates but a single statute * * *. For such a violation only the single penalty prescribed by the statute can be imposed." 317 U.S. at 54.

The question presented arises frequently in conspiracy prosecutions, and the principle enunciated in *Braverman* has won consistent adherence. E.g., *Carrado* v. *United States*, 210 F. 2d 712, 717 (C.A. D.C.) *cert. den.* 347 U.S. 1020; *Moss* v. *United States*, 132 F. 2d 875, 877 (C.A. 6); *United States* v. *McGee*, 117 F. Supp. 27, 32 (D. Wyo.). *Cf., May* v. *United States*, 175 F. 2d 994, 1002 (C.A. D.C.) *cert. den.* 338 U.S. 830. Not only have the decision and judgments below failed to give cognizance to this principle; they have sanctioned convictions which run directly counter to it. In so doing, the Courts below have denied Petitioners the fundamental protection of substantial rights which this Court has expressly taken pains to preserve.

V

The indictments in this case, alleging violations of 18 U.S.C. Sec. 206, charge the defendants with attempting to bribe "a juror summoned to the panel". Section 206 of Title 18, however, prohibits such activity only with regard to a "juror . . . authorized by any law of the United States to hear or determine any question, matter, cause, proceeding, or controversy, because of or with intent to influence his action, vote (etc.) . . ."

There can be no argument that a "juror" has no authorization to hear or determine any cause until he has actually been selected and sworn; he cannot "vote" or take any "action" in any cause until it has been tried before him unless he sits as one of the jury. The language of Section 206 clearly does not encompass a juror who has not been selected or sworn; and it would seem plain that a person does not become a "juror" within the meaning of Section 206 merely by being "summoned to the panel" for potential or prospective jury duty.[18]

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[18] Compare Rule 24(a), Federal Rules of Criminal Procedure, referring to "prospective jurors"; with 24(c) dealing with jurors who have been selected and sworn.

The Court below, while noting the restrictive language in the statute, nevertheless held 206 applicable, because "It is difficult to believe that Congress in the passage of this Act intended to protect the inviolability of twelve men, after they had been selected from a jury panel and had been sworn and placed in the jury box, yet permit one with impunity to corrupt them with bribes and offers of bribes while a member of the jury panel, but before they had been selected in a particular case." (App. A, Joint Appendix, p. 9). In so holding, the Court below ran clearly counter to the plain language of the statute and violated the fundamental precept that criminal statutes must be strictly construed.

The decision of the Court below is not limited in its effect merely to Section 206, but would presumably apply to Section 208 as well,[19] since that Section, which forbids the *acceptance* of bribes by jurors, contains the same descriptive language defining a "juror". Moreover, it would appear that both Sections 206 and 208 should be read along with Section 207[20] which forbids the acceptance of bribes by *judges;*[21] and Section 207, it should be noted,

[19] 18 U.S.C. Sec. 208 provides:

"Whoever, being a *juror*, referee, arbitrator, appraiser, assessor, auditor, master, trustee, receiver, United States commissioner, or other person *authorized by any law of the United States to hear or determine any question, matter, cause, controversy, or proceeding*, asks, receives, or agrees to receive, any money or thing of value, or any promise or agreement therefor, because of or with intent to be influenced in his vote, opinion, action, judgment, or decision, shall be fined not more than $2,000 or imprisoned not more than two years, or both." (emphasis added).

[20] See Reviser's Note following 18 U.S.C. Sec. 206.

[21] 18 U.S.C. Sec. 207 provides:

"Whoever, being a judge of the United States, accepts or receives any sum of money or other bribes, present or reward, or any promise, check, order, contract, obligation, gift or security for the payment of money, or for the delivery or

prohibits the acceptance by a judge of bribes given with intent to influence him in any cause "pending before him".

Does the broad construction adopted below with regard to Section 206 extend also to Section 208? And does it also apply to Section 207, so that the phrase "pending before him" must be ignored just as the qualifying language in Section 206 was ignored? Certainly, in an area of the law as fundamental and as delicate as that encompassed by these provisions, these important ambiguities should not be left unresolved.

None of the cases cited by the Court below as authority for its all-inclusive definition of "jurors" dealt with Section 206. *State* v. *Woodson*, 43 La. Ann. 905, 9 So. 903, is a decision of the Louisiana Court construing a Louisiana statute, which is analogous, at best, to 18 U.S.C. Sec. 1503.[22] *United States* v. *Marsh*, 106 F. 474, involved the application of the term "juror" in a civil suit over fees to be paid a clerk of a district court. And *United States* v. *Russell*, 255 U.S. 138, dealt only with the broader provision of the Criminal Code which is now Section 1503. That case was not concerned with the definition of the term "juror", but rather with the meaning of the word "endeavor". The casual definition of "juror" contained in that opinion was language incidentally used by this

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conveyance of anything of value, because of or with intent to be influenced in any opinion, judgment or decree in any suit, controversy, matter or cause *pending before him*, shall be fined not more than $20,000 or imprisoned not more than fifteen years, or both; and shall be disqualified from holding any office of honor, trust or profit under the United States." (emphasis added).

[22] Even Louisiana does not so loosely define "juror" in all its statutes. For at least one decision ruling, in another statutory context, that the word "juror", "has reference to accepted jurors and not prospective jurors.", see *State* v. *Towns*, 205 La. 530, 17 So. 2d 814, 815. And other state statutes analogous to Section 1503 have been interpreted as applying solely to "jurors" who have actually been selected and sworn. See e.g., *State* v. *Willford*, 86 S.W. 570, 572 (Mo. Ct. App.).

Court in its discussion of the problem of "scienter".[23] An examination of the briefs in the *Russell* case, No. 143 of the 1920 Term, reveals that neither party discussed nor was concerned with the definition of "juror". The reliance placed by the Court below upon *United States* v. *Russell* appears to be erroneous, and that opinion lends no support for the novel proposition for which it was cited.

A construction of the word "juror", as used in Sec. 206, has never been rendered by this Court. The construction made by the Court below is unprecedented; appears to be contrary to the plain language of the statute; and relies upon an inapposite decision of this Court. The expanded construction of "juror" adopted by the Court below can apply not only to Section 206 but also to Section 208, and may affect Section 207 as well. The Court below has decided an important question of federal law which has not been, but should be, settled by this Court.

VI

The decision of the Court below also raises important issues regarding the application and requirements of two of the Federal Rules of Criminal Procedure; and in each instance holds contrary to the express language and mandate of the Rules involved.

A. *Rule 25.* Rule 25, provides that another Judge may assume the duties of the trial judge "If by reason of

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[23] The Court stated: "The indictment charges that defendant knew that William D. Russell was a petit juror, in the discharge of his duty as such juror, and, therefore, an endeavor to corruptly influence him was within the section, though he was not yet selected or sworn." 255 U.S. at 143.

It should be noted that even under this test, the indictments in this case are defective. So far as Section 206 is concerned, the indictments charge only that such individuals were "summoned to the panel". And the indictments under Section 1503 contain no allegation that there was any endeavor to influence any "petit juror . . . *in the discharge of his duty*", the italicized words being omitted from these indictments but evidently thought essential by this Court in its *Russell* decision.

absence from the district, death, sickness or other disability the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt". This language appears clearly to require that only the judge before whom a trial was held or a guilty plea was entered may sentence a defendant unless—for the reasons set forth in the Rule—he is unavailable.

Petitioners' pleas of guilty to Indictment 13833 were entered before Judge Knous, who accepted these pleas and then referred the cases to the probation department for pre-sentence reports (R. 159, 162). Judge Ritter, nevertheless, insisted upon sentencing them without even indicating that Judge Knous was unavailable or that he had made any inquiry to determine whether Judge Knous was available (R. 482).[24] Indeed, it appears from the record that Judge Ritter did not care whether Judge Knous was available:

> "The Court: • • • Now, on Case No. 13833.
> "Mr. Morrissey: Your Honor, that plea was taken before Judge Knous.
> "The Court: Well I am sentencing him.
> "Mr. Morrissey: Well, Your Honor, note our objection.
> "The Court: Sure. • • •" (R. 482).

This colloquy, we believe, manifests a blatant disregard for the requirements of the Rule.

The Court below, in an effort to justify Judge Ritter's action, pointed out that the pleas had been entered without the taking of evidence (App. A, Joint Appendix, p. 15); thus, apparently implying that there was a distinction between a judge before whom a trial is had and a judge before whom a plea is entered. No such distinction is

[24] When objection to this method of proceeding was raised for the second time by Petitioners, Judge Ritter indicated that Judge Knous had asked him to impose sentence (R. 485); but neither he nor Judge Knous indicated the nature and basis of this request or how it met any of the conditions of Rule 25.

drawn in Rule 25: the term "tried" in the Rule embraces the entry of a guilty plea;[25] and the Rule applies after "a verdict or finding of guilt", and apparently the term "verdict" refers to the action of a jury (see Rule 31), and the term "finding" to the action of a judge. Nor does Rule 25 draw a distinction between pleas of guilty and not guilty, nor between cases in which a judge hears witnesses and where he does not. Such niceties are irrelevant to the more fundamental concept that one judge and one only is empowered to dispose of a whole cause from beginning to end; and that an accused shall have the same judge to adjudicate his guilt and to prescribe his sentence.

The only decision which the Court could muster in support of its view was *Owens* v. *Hunter,* 169 F. 2d 971 (C.A. 10). But that case was a habeas corpus proceeding, in which a sentence was being subjected to collateral attack. Perhaps a sentence entered by another Judge is not so void that it must be upset on habeas corpus; but where such a sentence is challenged on a direct appeal—as was done in this case—it should be overturned. For, as the Court below noted in the very same case it used as authority: "• • • *ordinarily* sentence should be imposed by the judge before whom the conviction was had • • •." *Owens* v. *Hunter, supra,* at 972. (Emphasis added).

B. *Rule 32(a).* Rule 32(a) provides that "Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment". The language of the Rule appears plainly to impose the obligation to afford this opportunity to a defendant *on the court.*[26] And there is nothing in the Rule which suggests

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[25] The Tenth Circuit itself has used the phrases "trial" and "accept a plea of guilty" interchangeably. *Donnelly* v. *United States,* 185 F. 2d 559, 561, *cert. den.* 340 U.S. 949.

[26] This is recognized in the Judgment and Commitment Form, which recites, "• • • *and the court having asked* the defendant whether he has anything to say why judgment should not be pronounced • • •" (R. 93, 107, 136-40). (emphasis added).

that this right is waived by the defendant if not demanded.

In the proceedings below Judge Ritter did not afford Petitioners this opportunity. His sentences were swift and inexorable; and there was no opportunity for the Petitioners to make a statement, nor for their counsel to request the opportunity for them to do so. When the matter was raised before the Court below, that Court held that "it does not, however, follow in all cases that a failure by the Court to ask defendant if he has any statement to make results in a violation of the rule or denial of due process" (App. A, Joint Appendix, p. 14); and refused to hold this to be an error in the sentencing proceedings.

The Court below relied upon the fact that counsel did not affirmatively request an opportunity to make a statement.[27] But the bare record in this case clearly conveys the unseemly haste and singleness of purpose in the sentencing proceedings (R. 480-7), making it futile for counsel to make their requests of record. The sentencing was almost finished before it was begun; and to hold counsel rather than the court to account for what transpired amidst such speed and confusion is to invite and condone disregard of the Rule's explicit requirement. The Rule, after all, lodges the burden on the court—and it is not for the court, in turn, to pass its burden on to counsel. Cf., *United States* v. *Sandroff*, 174 F. 2d 1014, 1020, *cert. den.* 338 U.S. 947.

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The Federal Rules of Criminal Procedure govern the trial of criminal cases in the district courts of the United States. See *Bryan* v. *United States*, 338 U.S. 552, 558.

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[27] The cases cited by the Court below do not justify such reliance. In *Shockley* v. *United States*, 166 F. 2d 704, 717 (C.A. 9), *cert. den.* 334 U.S. 850, this issue was grouped together with a number of others which the Court dismissed summarily without discussion of why they lacked merit; and *Savage* v. *District of Columbia*, 54 A. 2d 562, 569 (Mun. Ct. App. D.C.) dealt with a misdemeanor under the Rules of the Municipal Court for the District of Columbia and not a felony under the Federal Rules of Criminal Procedure.

They have the "effect of law". *Ochoa* v. *United States*, 167 F. 2d 341, 345 (C.A. 9). Since they establish the procedure which protects individual rights, there should be clarity and precision in their application. Corrosion of their purpose, looseness in their application—no matter how creeping and slight—should not be tolerated; and only this Court has the power to effect full and uniform adherence to their requirements.

VII

In Question 9, Questions Involved, p. 4, *supra*, we have raised the issue whether the points raised under Questions 2, 3, 4, 7 and 8 when taken together do not so taint the proceeding in their cumulative effect as to constitute a denial of due process even though, when examined "standing alone", they may not in and of themselves require reversal.

We think this Court has already answered this question and therefore only recall the admonition contained in *Kotteakos* v. *United States*, 328 U.S. 750, 765:

> "if one cannot say with fair assurance, after pondering all that happened, without stripping the erroneous action from the whole, the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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